No. 6346

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DAVID BURNET, Commissioner of Internal Revenue,

Petitioner,

vs.

SAN JOAQUIN FRUIT & INVESTMENT COMPANY (a corporation),

Respondent.

BRIEF FOR RESPONDENT.

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May it please the Court:

With respect to the introductory matter in the first two pages of the brief for the petitioner, we observe that it is not strictly accurate for the petitioner to say that

> "the case involves income and profit taxes for the years 1918, 1919, 1920 and 1921 in the respective amounts of $66,147.93, $45,133.14, $22,872,09, and $21,867.40."

Originally, before the Board, that *was* what was "involved;" but upon the present review, less is involved, i. e., only taxes for two years, 1920 and 1921. This was, indeed, conceded by petitioner, when he

came to more particular statement, in the paragraph that commences at the bottom of his page 9, in the ending of which, at the top of page 10, he expressly concedes that

> "the Commissioner raises no question concerning taxes for those years [1918 and 1919]."

This is emphaized by his two specifications of error, which are limited to the years 1920 and 1921.

There were three cases docketed before the Board:

Board Docket No.	Year	Alleged deficiency
6988	(1918	$66,147.93
	(1919	45,133.14
6989	1920	22,872.09
20810	1921	21,867.40

Upon the present review no question is open under the Board's Docket No. 6988, for the years 1918 and 1919.

Now, when we turn to the petitioners'

"STATEMENT OF FACTS,"

and look for the particular matter wherein petitioner seeks to lay a predicate for his argument, we find *a fatal vice,* viz., he lays his predicate at his pages 6, 7 and 8, upon quotations selected here and there from the *original* petitions (and a partial hearing thereon) before the Board, but it seems plain, as to the year 1920, that the statement of the case should not be founded upon the original pleadings. Docket No. 6989 was heard upon an *amended* petition, filed upon mo-

tion and leave, T. 77-78; and thereupon the original pleading became *functus officio,* and disappeared from the case.

> "The amended complaint was filed under the order of the court. An amended complaint, which is complete in itself, and which does not refer to or adopt the original complaint as a part of it, entirely supersedes its predecessor, and becomes the sole statement of the cause of action. The original complaint becomes functus officio from the date of the filing of its successor."
>
> *U. S. v. Gentry,* 119 Fed. 70, 75 (C. C. A.-8).

> "The original pleadings * * * no longer constitute a part of the record proper, because they are superseded by the amended pleadings * * *; and merely copying such pleadings into the record or transcript is insufficient to make them part of of the record."
>
> 4 *C. J.* 118, col. 1.

Petitioner's statement of the case ignores the *findings* of the Board. Under the practice since the Revenue Act of 1928, the Board's findings are included in the "opinion," *Commissioner v. Crescent Leather Co.,* 40 F. (2d) 833, 834, col. 2, and *respondent here adopts the opinion and findings in the present case, as they appear in full at pages 144 to 151 of the transcript, as the true statement of the case.* Respondent says that the record here under review consists of: 1. The amended pleadings. 2. The statement of evidence. 3. The findings (as contained in the "opinion"). And we say, further, that in the review, the only power and duty of the Court is to

determine, in point of law, whether there is enough evidence to sustain the Board's action.

Avery v. Commissioner, 22 F. (2d) 6;

Royal Packing Co. v. Commissioner, 22 F. (2d) 536;

General Water Heater Corp. v. Commissioner, 42 F. (2d) 419.

I.

NONE OF THE ASSIGNMENTS OF ERROR RAISE ANY QUESTION FOR REVIEW.

There are six assignments, and they appear at pages 157 and 158 of the transcript. Assignments 1, 2 and 3 are most general and directed solely to the *decision,* i. e., in substance that the Board erred in deciding generally for the petitioner. None of the assignments is pointed to any specific *ruling;* nor is there any assignment of *insufficiency* of evidence, either generally or upon any separate issue; nor is there any assignment of insufficiency of the facts found to support the decision. In consequence, there is nothing in any assignment for this Court to consider:

> "Such assignments present nothing for the conideration of an appellate court. They bring up for review no ruling of the trial court. They do not show that at any point in the proceedings the court below committed error."
>
> *Hecht v. Alfaro,* 10 F. (2d) 464, 466 (C. C. A.-9).

A general assignment that there was error in rendering judgment one way or the other is too indefinite for consideration:

> *Arkansas Anthracite Coal & Land Co. v. Stokes,* 277 Fed. 624, 627.

There are many other authorities, and they all come from rule 11 (C. C. A.-9), common to all circuits, requiring an assignment to set out separately and *particularly* each error asserted.

Assignments 4 and 5 are similarly defective; and contain the additional defect of being pointed to a non-reviewable order made by the Board *after* its decision, equivalent to an order upon motion for new trial. The decision was "promulgated" on June 29, 1929 (T. 143). The motion and order to which assignments 4 and 5 are pointed, occurred in December, 1929 (T. 152-153). This Court has jurisdiction only "to review the *decisions* of the Board." Revenue Act 1926, sec. 1003 (b).

Assignment 6 is unworthy of discussion.

II.

THE FIRST SPECIFICATION OF ERROR DOES NOT RISE UPON ANY ASSIGNMENT, NOR WOULD AN AMENDED ASSIGNMENT RISE UPON ANY OBJECTION, RULING OR EXCEPTION AT THE HEARING.

The first specification is that the Board erred

> "In not holding that the respondent was estopped to deny that it was the taxpayer and liable for the taxes for the years 1920 and 1921."

The assignments of error will be searched in vain for any mention of an estoppel.

Now, when the estoppel argument of petitioner, and all of his authorities cited thereunder, are examined, it will be seen that he is asserting an estoppel *in pais*, or an equitable estoppel. There is not in the record any objection, ruling, or exception relating to such an estoppel, and in consequence there is nothing to form the basis of a specification of *error*, nor of an amended assignment of *error*. To state the matter more in detail:

(a) The Commissioner Did Not Effectively Plead Any Estoppel, Such as he Now Attempts to Specify and Argue.

An estoppel must be specially pleaded.

Mabury v. Louisville, etc., Co., 60 Fed. 645, 656;

New York Life Ins. Co. v. Rees, 19 F. (2d) 781, 785;

Grauf v. State Nat. Bk., 40 F. (2d) 2, 7.

The "answer to amended petition" in Docket No. 6989 (T. 97-99) is typical of all. The pertinent portion reads:

> "Denies generally and specifically each and every allegation in taxpayer's amended petition not hereinbefore expressly admitted, qualified or denied, and respondent further says that petitioner should not be heard to assert that it is not the taxpayer in this case, for the reason that the original petition was filed September 10, 1925, in which original petition the taxpayer asserted that it was formerly the San Joaquin Fruit & Investment Co. implying thereby that San Joaquin

> Fruit & Investment Co. was merely a change in name. Respondent further says that heretofore, to-wit, on May 3, 1927, the taxpayer did engage in the trial on the merits of its case in so far as questions other than special assessment were concerned and that it should not therefore be now heard to assert that it is not the taxpayer involved in this appeal."

That is nothing more than an attempt to plead a quasi-estoppel, founded upon inconsistency of position within a judicial proceeding, as to which the rules are:

> "A party who has, with knowledge of the facts, assumed a particular position in judicial proceedings, and has succeeded in maintaining that position, is estopped to assume a position inconsistent therewith to the prejudice of the adverse party. It is necessary, however, that the claim or position previously asserted or taken should have been successfully maintained, that it should be actualy inconsistent with the position presently taken, and that it should not have been taken through the fault of the adverse party. It is essential also that the party claiming the estoppel should have been misled by his opponent's conduct, that he should have acted in reliance thereon, and that his rights would be injuriously affected if his opponent were permitted to change his position. When no wrong is done a change in position should and will be allowed. The rule has no application where the knowledge or means of knowledge of both parties is equal, nor in case of mistake. Also the rule has no application to change of position with respect to matters of law."
>
> 21 *C. J.* 1223, § 227.

In consequence, the answer raised no issue, as a comparison of it with the foregoing passage from *Corpus Juris* discloses that there are at least four material elements missing from the plea, leaving it fatally defective. Moreover, none of the authorities cited in the Commissioner's brief have any bearing upon the type of estoppel abortively pleaded.

Indeed, the pleading is fatally insufficient to raise an issue of any species of estoppel whatever.

(b) The First Specification Must Fail, Because in Effect it is a Specification that a Particular Finding Was Not Made, Which Finding, if it Had Been Made, Could Not Have Affected the Result.

The rule is that "the only purpose of findings is to answer the questions put by the pleadings," *Rauer v. Bradbury,* 3 Cal. App. 256 (84 Pac. 1007, 1009). Suppose the Board had made a finding, reading: "The Board finds that all the allegations of paragraph 5 of the Commissioner's answer to the amended petition are true;" in what posture would that have put the case? Exactly as it is now, because material elements of an estoppel would be missing from the findings, precisely as they are missing from the abortive plea. In consequence, the first specification of error is of *harmless* error, for if the desired finding had been made the result could not change.

(c) The Commissioner Abandoned and Repudiated Before the Board the Claim of an Estoppel Such as is Now Attempted to be Specified and Argued.

This plainly appears in the following quotation from pages 188 and 189 of the transcript:

"Mr. Foley [attorney for the Commisioner]. Now I want to briefly make a few suggestions regarding my opponent's argument. Throughout his argument he referred to estoppel and he was very evidently laboring under the impression that the Commission was seeking to raise what is called an estoppel *in pais,* or equitable estoppel. That is one arising out of a misrepresentation by one party which is believed in and acted upon by the opposite party to his detriment, and therefore the person who believes in and acts upon this misrepresentation is entitled to have the Court say to the one who had deceived him, 'Having deceived this man before, you can't now tell us the truth.' That is an inequitable estoppel, and it is not the estoppel we rely upon at all. We rely upon the estoppel, which is akin to the familiar estoppel of the tenant to deny his landlord's title and in that estoppel there is no trace, —there is essentially no trace or no element whatever of deceit. If I go into possesion of a certain property as your tenant, I am estopped to deny your title whether I know you had one or not, and equally you are estopped to deny my tenancy whether you know you had title or not. Misrepresentation and deceit is entirely absent. Now, I want to cover that more fully in my brief, but I want to correct right now the misapprehension which I was afraid might be raised."

Having adopted that theory before the Board, the Commissioner is restricted to it before this Court, 3 *C. J.* 718, § 618.

III.

THE SECOND SPECIFICATION OF ERROR DOES NOT RISE UPON ANY ASSIGNMENT, NOR WOULD AN AMENDED ASSIGNMENT RISE UPON ANY OBJECTION, RULING OR EXCEPTION AT THE HEARING.

The second specification is that the Board erred

> "In deciding that the Commissioner did not determine deficiencies in taxes for the years 1920 and 1921 against the respondent as a transferee under the provisions of Section 280 of the Revenue Act of 1926."

No assignment supports the specification. Moreover, a "specification" should be *specific*. How did the Board err "in *deciding?*" Is it meant that the facts found are insufficient? Or that the evidence is insufficient to support some finding?

Where are we to look in the 262 pages of this transcript of record to find any objection, ruling or exception relating to the liability of a transferee? *At no stage of the hearing before the Board did the Commissioner claim that Investment Company was liable as a transferee of Fruit Company.*

It is fundamental that a Court sitting in *review* with no power *de novo,* cannot "review" a question not considered by the lower tribunal. *Landsberg v. S. F. & P. S. S. Co.,* 288 Fed. 560 (C. C. A.-9); *Bilboa v. U. S.,* 287 Fed. 125 (C. C. A.-9). As was said in the latter case:

> "This is an appellate tribunal, constituted and organized to review the rulings of subordinate tribunals, and ordinarily it will not consider an asisgnment of error, unless based on a ruling of the trial court and an exception duly noted (Fin-

> ley v. U. S. 256 Fed. 845, 168 C. C. A. 191; Central R. Co. of N. J. v. Sharkey, 259 Fed. 144, 170 C. C. A. 212), for, as said by the Supreme Court of the United States in Robinson v. Belt, 187 U. S. 41, 23 Sup. Ct. 16, 47 L. Ed. 65, 'while it is the duty of this court to review the action of subordinate courts, justice to those courts requires that their alleged errors should be called directly to their attention, and that their actions should not be reversed upon questions which the astuteness of counsel in this court has evolved from the record.' "

Moreover, when a Court sits in statutory review of an order or decision of a branch of the executive in the course of a quasi-judicial hearing, the judicial review will not extend to any contention not specifically made before, and pressed upon, the executive:

> "The contention to which we have hitherto referred, that the arrangement made by the Terminal Company violates the commodity clause of the act to regulate commerce, is not necessary to be considered. There is nothing in the record showing that such a contention was pressed upon the Commission, considered by that body, or that the order rendered was in any respect based upon the commodity clause."
>
> *U. S. v. B. & O. R. Co.,* 231 U. S. 274, 292 (58 L. Ed. 218, 227);
>
> *Bernsten v. U. S.,* 41 F. (2d) 663 (C. C. A.-9).

> "The real difficulty presented by the record in the case at bar was the fact that the claim presented to the court for adjudication has never been presented to the Bureau."
>
> *Bernsten v. U. S.,* supra.

> "We think the question is not properly before us. It was not specifically raised on the record before the Board or either court below and, so far as appears, was not considered by any of them. * * * This Court sits as a court of review. It is only in exceptional cases, and then only in cases from the federal courts, that questions not pressed or passed upon below are considered here. *Duignan v. United States,* 274 U. S. 195. There are specially cogent reasons why this rule should be adhered to when the question involves a practice of one of the great departments of the government."
>
> *Blair v. Oesterlein Co.,* 275 U. S. 220, 225.

Furthermore, even if the question had been presented in the evidence to the lower tribunal, the latter was without power to go out of its appointed sphere and undertake to hear or decide an issue not presented to it by either the deficiency notice or the pleadings:

> "Jurisdiction may be defined to be the right to adjudicate concerning the subject matter in the given case. To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and, third, the point decided must be, in substance and effect, within the issue. That a court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that upon

general principles, such a defect must avoid a judgment. It is impossible to concede that, because A and B are parties to a suit, a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over these particular interests which they choose to draw in question that a power of judicial decision arises."

Reynolds v. Stockton, 140 U. S. 254, 268 (35 L. Ed. 464, 469);

Osage Oil & Ref'g. Co. v. Continental Oil Co., 34 F. (2d) 585, 588, col. 2, and cases there collected;

U. S. v. Goldstein, 271 Fed. 838, 845;

Federal Trade Comm. v. Gratz, 253 U. S. 421, 427 (64 L. Ed. 993, 996, col. 1).

Neither the deficiency letters, nor the pleadings, raised any issue of liability of a *transferee.*

IV.

EVEN IF THE FIRST SPECIFICATION WAS PROPERLY RAISED FROM THE RECORD, THE ARGUMENT THEREUNDER THAT "RESPONDENT IS ESTOPPED TO ASSERT THAT IT IS NOT THE TAXPAYER," IS WITHOUT MERIT.

(a) The Statute Raises the Jurisdiction of the Board Solely From the Commissioner's "Deficiency Letter," and Thereby Negatives all Other Modes of Acquisition of Jurisdiction; in Consequence, the Board Cannot Raise Jurisdiction From Estoppel.

The jurisdiction of the Board is initiated by the mailing of a "deficiency notice" by the Commissioner,

followed by an "appeal" therefrom to the Board. The statute prescribes that mode, and prescribes no other.

> "And this was the only way in which the property of the Company could be reached for taxation at all, for when a statute limits a thing to be done in a particular mode, it includes a negative of any other mode."
>
> *Raleigh, etc. Co. v. Reid,* 80 U. S. 269;
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> *Botany Worsted Mills v. U. S.,* 278 U. S. 282, 289;
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> 25 *C. J.* 220, note 17 (c);
>
> *Stradling v. Morgan,* 1 Plowden 199, 206 (75 English Reprint 305, 316-317);
>
> *Maney v. U. S.,* 278 U. S. 17.

> "The mode which the statute prescribed for a revision of the assessment is the measure of the power, and unless that mode is followed, any attempted revision will be nugatory. Where a statute prescribes the mode of acquiring jurisdiction, the mode must be complied with, or the proceedings will be a nullity. * * * A notice which, by its terms, is directed to A is ineffectual as a notice to B, even though it is delivered to B and he is thereby informed of its contents."
>
> *Williams v. Bergin,* 108 Cal. 166;
>
> *Mahaffey v. Pattel,* 266 Pac. 430 (Idaho).

With reference to a situation exactly in point, the Board said in *Carnation Milk Products Co.,* 20 B. T. A. 627, 634 (Acq. X-3 Int. Rev. Bull. 4901, p. 1):

> "With respect to the contention of the respondent that, while the two corporations may be considered separate legal entities, they are for all practical purposes the same, and that the peti-

> tioner is estopped from denying that it is the taxpayer, it must be remembered that the Board is a tribunal of limited jurisdiction, Aldine Club, 1 B. T. A. 710, and Consolidated Cos., 15 B. T. A. 645, and whatever jurisdiction it may have is definitely prescribed by the statute creating it and responsible for its continued existence. Therefore, the Board is powerless to apply rules of law, although applicable under other and different cirstances, which would tend to enlarge the jurisdiction of the Board or to substitute parties for those definitely prescribed by the statute."

In other words, even though principles of estoppel might be applied to waivers or other questions of *fact,* they cannot be applied so as to give the Board any *jurisdiction* which it would not have under the law.

In *Massachusetts Fire & Marine Ins. Co. v. Commissioner,* 42 F. (2d) 189 (C. C. A.-2), the Court held that it did not obtain jurisdiction of an appeal from the Tax Board by a *stipulation of both parties,* where the taxpayer was not a "resident" of the Second Circuit. This decision was followed in *Nash-Breyer Motor Co. v. Commissioner,* 42 F. (2d) 192, (writ of certiorari denied on January 5, 1931); and in *Grain King Mfg. Co. v. Commissioner,* C. C. A. 2nd Cir., February 2, 1931. See also *Spring Canyon Co. v. Commissioner,* 38 F. (2d) 764.

If jurisdiction cannot be obtained by written stipulation or consent, it is difficult to see how it could be obtained by estoppel. In the above cases, the Circuit Courts dismissed the appeals for lack of jurisdiction

on their own motions, despite the stipulations of the parties.

Likewise, in the present case the Board properly dismissed for lack of jurisdiction the appeal erroneously filed by the Investment Company on the deficiency notice for 1921 mailed to the Fruit Company. The record shows clearly that the Fruit Company was completely and finally dissolved by decree of the Superior Court, Orange County, California, on December 26, 1922, and that three named individuals were appointed trustees in liquidation (R. 214-223). Under California law, the Fruit Company was legally dead and could not thereafter act as a party in any litigation. In *Newhall v. Western Zinc Mining Co.*, 164 Cal. 380, 128 Pac. 1040, the Supreme Court of California said:

> "We can perceive no force to the argument that the appellant is estopped from complaining of the judgment. Herein it is said that as the directors are made trustees of the defendant corportion, and as the corportate answer was filed by one of these directors or trustees, it results that the stockholders' own trustee filed the answer in this case, and that this director or trustee having defended the action, and having admitted the corporate existence of the defendant, the stockholders are bound by this action. But to this it must be replied that the law authorizes the directors and not one of them, to act as trustees. It empowers them to sue and be sued but not to answer suits in the name of the defunct corporration. Brangier's answer was, therefore, not only without authority of law, but in direct violation of law."

See also *Sanborn Bros., Successors etc.,* 14 B. T. A. 1059, Acq. VIII-2 C. B. 46) in which the Board reviewed the California law and decisions on this point.

This principle was also recognized and applied by the Supreme Court in *Oklahoma Natural Gas Co. v. Oklahoma,* 273 U. S. 256, in which counsel for all parties joined in a motion to substitute a successor corporation as a party. The Supreme Court there said:

> "It is well settled that at common law and in the federal jurisdiction *a corporation which has been dissolved is as if it did not exist,* and the result of the dissolution cannot be distinguished from the death of a natural person in its effect. * * * To allow actions to continue would be to continue the existence of a corporation *pro hac vice.* But corporations exist for specific purposes, and only by legislative act, so that if the life of the corporation is to continue even only for litigagating purposes it is necessary that there should be some statutory authority for the prolongation. *The matter is really not procedural or controlled by the rules of the court in which the litigation pends.* It concerns the fundamental law of the corporation enacted by the state which brought the corporation into being." (Italics here and in other quotations, *infra,* are ours.)

For the 1921 taxes, the Commisioner issued a deficiency notice to the Fruit Company, which had previously dissolved. The Investment Company, a successor corporation, without any legal authority, filed a petition for the dissolved corporation. Obviously, under the decisions cited above, the Board

obtained no jurisdiction thereby over the dissolved corporation and no principle of estoppel could apply. Likewise, since the notice of deficiency was addressed to the Fruit Company, the Board could not obtain any jurisdiction over the Investment Company through the petition mistakenly filed by it on behalf of the dissolved corporation. It is not a question of equity or estoppel, but a question of statutory jurisdiction.

Accordingly, even if this Court should find that all the essential elements of estoppel were present, we respectfully submit that such finding could not confer any jurisdiction in the Board on the 1921 proceeding.

(b) Even Though the Board Could Base Jurisdiction on Estoppel, Nevertheless the Familiar Elements of Estoppel are Not Present in the Record, as to Either of the Years in Dispute, 1920 and 1921.

1920—The deficiency notice for 1920 was addressed to the Investment Company, itself (T. 232). No mention was made therein of the Fruit Company. Had the Investment Company failed to file an appeal, the Commissioner would have been legally empowered to assess and collect the tax from it. Section 274 (c), Revenue Act of 1924. Accordingly, it acted on its own behalf and was in no sense a volunteer when it filed its petition with the Board.

This petition (T. 19-29) set forth clearly in its heading that the San Joaquin Fruit and Investment Company was "formerly San Joaquin Fruit Co." Likewise, the verification referred to the Investment Company as "a successor to the San Joaquin Fruit Com-

pany." There was clearly no misrepresentation in either of these statements. On the contrary, they expressly put the Commissioner on notice that the Investment Company was not the same corporation or taxpayer as the Fruit Company.

While the officers of the Investment Company knew that the Fruit Company had been legally dissolved, they did not know to what extent they were legally liable for its taxes in the action before the Board and the petition proceeded to defend against the deficiencies on the merits. Subsequently, however, the Commissioner issued, on December 29, 1927, a deficiency notice to the Investment Company as "transferee" of the Fruit Company for 1921 taxes, and this brought up squarely, for the first time, the legal questions now involved in this case (T. 180). Careful study by its attorneys then disclosed that the Investment Company was not legally liable for the 1920 taxes of the Fruit Company in the proceeding then pending before the Board, and by leave an *amended* petition was filed on April 4, 1928, setting forth all the facts in detail.

The record (pp. 173-185) shows clearly that the Board went deeply into the question of good faith of the Investment Company and its decision indicates that it was fully satisfied on that point. Accordingly, there was no element of intentional deception.

Furthermore, the dissolution of the Fruit Company was a matter of public record of which the Commissioner, like all other persons, was presumed to have knowledge. This dissolution occurred in December, 1922, and as late as 1925, a revenue agent examined

the books of the Fruit Company for the year 1921. Certainly, he was in a position clearly to determine the facts. The record shows that the Commissioner issued letters at various times indiscriminately to the Fruit Company and to the Investment Company.

The truth of the matter is that the real error occurred on July 27, 1925, when the Commissioner issued the deficiency letter to the "Investment Company" rather than to the "Fruit Company." *There is absolutely nothing in the record to show that this mistake was induced by any misrepresentation by the Investment Company. All that followed was a natural consequence of this initial error of the Commissioner.* The Investment Company very properly filed an appeal, as it was required to do under the law, to protect its rights.

It should be remembered that the burden of proof was upon the Commissioner to show that he "was permissibly ignorant of the truth of the matter." It was neither the duty nor within the power of the respondent to show when the Commissioner first acquired knowledge of the facts.

Furthermore, it was an essential element of the Commissioner's case that he show that he relied upon the alleged misrepresentations, and that he was misled thereby to his injury. The 1920 return was filed March 15, 1921 (T. 168), and the statutory period of limitations (five years) against the Fruit Company would not have expired before March 15, 1926. Section 277(a) (3) Revenue Act of 1926. Furthermore, if waivers were filed for that year, the period would

be extended accordingly. Section 278(c), Revenue Act of 1926. The statutory period for proceeding against the Investment Company as a transferee would not run until "one year after the expiration of the period of limitation for assessment against the taxpayer," which in no event would be earlier than March 15, 1927, and perhaps later. Certainly, it was incumbent upon the Commissioner to show positively that he did not acquire knowledge of the facts before the statute of limitations had run on transferee proceedings against the Investment Company, for otherwise he would not be injured by the alleged misrepresentations.

1921.—The deficiency notice for 1921 was addressed to the Fruit Company and the appeal was erroneously filed by a wholly different party, the Investment Company. Obviously, this did not give the Board any jurisdiction unless it obtained it by estoppel. The Commissioner has failed utterly to allege or prove that there were any intentional or negligent misrepresentations of material facts by the Investment Company but rather the evidence shows a mere mistake of law on the part of the Commissioner.

Furthermore, the Commissioner has not shown that he acted on the alleged misrepresentations to his injury. On the contrary, the record shows clearly that he was not injured at all, for the reason that *the statute of limitations had run on additional taxes for the Fruit Company for 1921, long before the deficiency notice in question was mailed.* The 1921 return was filed May 12, 1922 (T. 168). In the absence of any valid waivers, the statute of limitations (four years)

would run on May 12, 1926. Section 277(a) (2), Revenue Act of 1926. The deficiency notice was not mailed until September 1, 1926, and the appeal was not filed until October 25, 1926. Accordingly, in the absence of valid waivers, the deficiency in question was barred by limitations nearly six months before the petition was filed in which the misrepresentations are alleged to have occurred. As the Commissioner's rights had been already extinguished (Section 1106(a), Revenue Act of 1926), it is difficult to see how he can claim that he was injured in any way by the petition filed by the Investment Company.

While the Commissioner may contend that there were valid waivers outstanding and accordingly that the deficiency was not barred before October 25, 1926, the record speaks for itself. Not a single waiver was introduced in evidence, although the Government attorney was put on notice and was given an opportunity to offer any waivers he might have (T. 169). Since *resulting injury* is an essential element in an estoppel, and the burden was on the Commissioner to prove every element, it follows that his case must fall—for the record shows that the injury, if any, occurred long before the act in question and could not possibly have resulted therefrom.

It seems obvious that the proper procedure for the Commissioner to have followed was the issuance of a *transferee* notice to the Investment Company, rather than a *deficiency* notice to the dissolved taxpayer. The Commissioner evidently reached the same conclusion, for on December 29, 1927, he issued a transferee notice to the Investment Company for the 1921

taxes here in question (T. 234). It is not to be assumed that the Commissioner issued said transferee notice without proper authority or that such proceeding will not be effective to collect the taxes here in question. Certainly, the burden is upon the Commissioner to show why he should be allowed to recover in this action, under some theory of estoppel, taxes which he presumably will recover in another proceeding already pending against the same corporation against which the alleged estoppel is asserted. The Commissioner's positions in these two proceedings are absolutely inconsistent with his present contention that he has been fatally injured. The very contrary appears from the record.

Accordingly, the Commissioner has failed to show affirmatively in the record either that the injury, if any, did not occur before the alleged misrepresentations, or that he has not at the present time a full and proper remedy in the transferee proceeding pending before the Board.

The cases cited by the petitioner all relate to general questions of *estoppel in pais,* presenting the usual problems, and in none of them was any attempt made to acquire *jurisdiction* by estoppel. For convenience of the Court, we are summarizing them briefly below:

Casey v. Galli, 94 U. S 673. Stockholder of a bankrupt corporation was not allowed to show, in suit on stockholder's liability, that the corporation was not legally a national bank, where it had acted as such, with the assent of more than two-thirds of its stockholders. No question of jurisdiction.

Morgan v. Railroad Co., 96 U. S. 716. Suit against railroad company for possession of land was met with defense that the plaintiff was estopped to deny that public dedication of the property had been made. No question of jurisdiction.

Universal Steel Co. v. Commissioner (C. C. A. 2nd), January 9, 1931. No question of estoppel was presented.

Trustees for Ohio & Big Sandy Coal Co. v. Commissioner, 43 F. (2d) 782. Question of validity of waiver not personally signed by the Commissioner. The Court merely stated that the taxpayer could not urge the bar of the statute which it had expressly agreed to waive. No question of jurisdiction.

Liberty Baking Co. v. Heiner, 37 F. (2d) 703; *Loewer Realty Co. v. Anderson,* 31 F. (2d) 268. Both of these cases held merely that a waiver was not invalid for lack of consideration where properly executed. Note that the Supreme Court, in *U. S. v. Stange,* January 5, 1931, held that consideration was not necessary to the validity of consents, even though executed after the statute had run, without resting its decision upon any principle of estoppel.

Lucas v. Hunt, 45 F. (2d) 781. In a transferee proceeding against the former president and liquidator of a dissolved corporation, the Court held that he was estopped to deny the validity of a waiver which he himself had executed and filed for the dissolved corporation. No question of jurisdiction.

Rockwood v. U. S., 38 F. (2d) 107—Estoppel asserted by Court against plaintiff, trustee of dissolved

corporation, who had filed corporation return and claims for refund asserting that it was still in existence, to show that it had been previously dissolved. The Court pointed out, however, that the trustee in any event would have been subject to the same corporate taxes as an "association." No question of jurisdiction. Compare *Rockwood v. U. S.*, 39 F. (2d) 984, in which estoppel was denied for a different year.

Examination of the above cases will show that they involved materially different situations from that here presented. In none of them was there any question of jurisdiction and in at least four there was not even a true case of estoppel.

It is interesting to review, on the other hand, the numerous cases in which the Board has considered its lack of jurisdiction over appeals filed by unauthorized transferees or successors to a dissolved corporation. The principal decisions are as follows:

Bisso Ferry Co., 8 B. T. A. 1104;
Canghey-Jassman Co., 8 B. T. A. 201;
Bond, Inc., 12 B. T. A. 339;
Weis & Lesh Mfg. Co., 13 B. T. A. 144;
American Arch Co., 13 B. T. A. 552;
Sanborn Bros., Successors, 14 B. T. A. 1059 (Acq. VIII-2 C. B. 46);
S. Hirsch Distilling Co., 14 B. T. A. 1073 (Acq. VIII-2 C. B. 23);
Engineers Oil Co., 14 B. T. T. 1148 (Acq. VIII-2 C. B. 16);
Consolidated Textile Corp., 16 B. T. A. 178;
Union Plate & Wire Co., 17 B. T. A. 1229 (Acq. IX-1 C. B. 55);

Gideon-Anderson Co., 18 B. T. A. 329;
Van Cleave Trust, 18 B. T. A. 486 (Acq. IX-1 C. B. 55);
Carnation Milk Products Co., 20 B. T. A. 627 (Acq. X-3-4901).

In all of the above cases the question related to the jurisdiction of the Board where an appeal was filed by some unauthorized transferee or successor of a dissolved company, and in all of them the Board denied jurisdiction. Some of these cases were dismissed by the Board on its own motion. In several, the dismissal was *upon motion of the Commissioner.* See, for example, *American Arch Co.,* supra, and *Bond, Inc.,* supra. In others, the dismissal was made over the protests of the transferee. See, for example, *Bisso Ferry Co.,* supra. In only two of these cases did the Commissioner take an appeal to a Circuit Court of Appeals, and both of these appeals have been dismissed recently *upon motion of the Government.* See *Commissioner v. Gideon-Anderson Co.,* C. C. A. 8th Cir., October 17, 1930; *Commissioner v. Consolidated Textile Corporation,* C. C. A., 4th Cir., October 21, 1930. So far as we know, none of the other cases have been appealed except the appeal in the instant proceeding.

We respectfully submit that the Board either does, or does not, acquire jurisdiction in this type of case, and that it cannot be left to the option or election of the Commissioner. Certainly, it would be a travesty on justice to allow one party to actions of this kind to determine for the Board whether it can assume jurisdiction.

As will be noted from an examination of these cases, the Commissioner has taken absolutely inconsistent positions, but the Board and the Courts, *in all decided cases,* have consistently denied jurisdiction under these circumstances. We respectfully submit that jurisdiction is a question of law, not dependent upon the consent, waiver, estoppel, or election of one or both parties.

As was said by Judge Rudkin in *Flynn v. Haas Bros.,* 20 F. (20) 510, "every estoppel must be mutual." Since the Commissioner has taken and maintained the position in cases of this kind that the Board has no jurisdiction, he should not be permitted in the present case to maintain the contrary position. Even if the question were doubtful, such doubts should be resolved in favor of the taxpayer, and the findings of the Board should not be reversed.

V.

EVEN IF THE SECOND SPECIFICATION WAS PROPERLY RAISED FROM THE RECORD, THE ARGUMENT THEREUNDER, IN EFFECT THAT JURISDICTION ARISING UPON A LETTER ASSERTING A DEFICIENCY AGAINST A TAXPAYER MAY BE METAMORPHOSED INTO JURISDICTION OVER A TRANSFEREE, IS WITHOUT MERIT.

(a) There is a Clear Distinction Between a Letter Asserting a Deficiency Against a Taxpayer, and a Letter Asserting a Liability Against a Transferee.

This is illustrated in the decision of the Board in *Edward Michael et al.,* Docket 31,832, March 10, 1931, wherein the Commissioner's letter asserted a liability upon the part of the addressees as *transferees* for

income taxes due from a corporation for the year 1922. *Inter alia,* the Board said:

> "The argument of the petitioner is that the notices mailed November 19, 1926, asserting liability under section 280 of the act are 'notices of a deficiency' and are 'mailed to a taxpayer.' Unless both of these contentions are sound, the petitioner's argument must fail.
>
> "Section 280 distinguishes between 'the liability at law or in equity, or a transferee of property of a taxpayer' and 'a deficiency in a tax.' It provides that the former shall 'be assessed, collected and paid in the same manner' as the latter. This serves to make the procedure similar but the language clearly differentiates between a liability as transferee and a deficiency. Had Congress intended the construction for which petitioner contends it would have been much simpler to have modified the definition of a deficiency to include such a liability. Instead we find it drawing a distinction.
>
> "Nor do we believe that one who becomes liable to pay the tax of another because of a liability at law or in equity is the 'taxpayer' as that word is used in the portions of the statute quoted above. The section deals with the liability of a transferee of property of a taxpayer to pay the tax imposed upon the taxpayer. There is a distinction drawn in this section between a taxpayer and one liable at law or in equity to pay his tax. The act, in section 2 (a) (9) defines a taxpayer as one 'subject to a tax imposed by this Act.' The act imposes no tax upon the transferee of assets of a taxpayer. It creates no new liability. It merely provides a new method by which the liability

which arises at law or in equity may be determined and enforced. Henry Cappillini, 14 B. T. A. 1269. Conference Report on the Revenue Bill of 1926 (69th Congress, 1st Session, Rept. No. 356)."

It will be noted that in the case just cited the Commissioner was arguing the exact opposite of his present contention and successfully maintained that there is a fundamental distinction in the law between a notice to a person as a transferee or fiduciary, and a notice to the same person as a taxpayer. Not only was the Board's decision sound, but it is impossible to reconcile the position which the Commissioner now takes in this case with the position which he established in the case just cited.

It should be kept in mind that Section 280, Revenue Act of 1926, contains drastic provisions which may and often do work injustice and gross hardship. It substitutes summary proceedings against one person for the collection of taxes of another, in place of the usual suits in equity, and deprives the transferee of many defenses which it would have in a Court of equity. Grave doubt exists as to its constitutionality. Certainly, the operation of such an unusual and arbitrary provision should not be extended by implication or inference. If any reasonable doubt exists as to the jurisdiction of the Board in the present situation, that doubt should be resolved against the Government and in favor of the taxpayer. See *United States v. Updike,* 281 U. S. 489; *Gould v. Gould,* 245 U. S. 151; *U. S. v. Merriam,* 263 U. S. 179; *Smietanka v. First*

Trust & Savings Bank, 257 U. S. 602; *U. S. v. Field,* 255 U. S. 257.

This principle was clearly stated by this Court in *Lynch v. Union Trust Company of San Francisco,* 164 Fed. 161, as follows:

> "In the construction of statutes imposing taxes *and especially burdens of special or unusual nature,* in cases of doubt or ambiguity, every intendment is to be taken against the taxing power."

(b) As No Transferee Letter Was Mailed for Either of the Years 1920 and 1921, the Commissioner's Argument Under His Second Specification is Unsound, as the Board Could Not Hear and Decide a Transferee Liability in the Absence of a Transferee Letter as a Foundation of Jurisdiction.

The petitioner apparently places his reliance upon the provisions of Section 283 (b) Revenue Act of 1926. This sub-section of the Act relates solely to appeals filed before the enactment of the 1926 Act. Accordingly, it is applicable only to the proceeding for the year 1920, because the appeal to the Board for the year 1921 was not taken until after the 1926 Act became effective. It follows that the petitioner has failed utterly to show affirmatively that the Board had jurisdiction of the 1921 appeal. As a matter of fact, the absurdity of the petitioner's position is established by his action in asserting a deficiency against the respondent during the latter part of 1927, as transferee of the Fruit Company (T. 234). Such transferee proceeding is now awaiting trial before the Board. How, then, can petitioner now assert that the Board should have retained jurisdiction and deter-

mined the respondent's liability as transferee, when the very issue that he now raises is joined in a proceeding before the same Board against the same petitioner, covering the same year and in the same amount? If the respondent is liable as transferee for the year 1921 such liability can and will be determined under the formal transferee proceedings now pending before the Board, which determination will give the petitioner the same hearing that he seeks in this case.

Considering now the petitioner's contention that the respondent is liable as a transferee for the year 1920, it is pertinent to present a summary of the provisions of the 1926 Act that relate to appeals pending at the time of its passage. The purpose of the enactment of Section 283 (b) of such Act becomes apparent when it is read in conjunction with related sections.

Section 274 provided for the mailing of *deficiency* notices and the filing of petitions with the Board in the case of deficiencies in taxes imposed by the 1926 Act. Section 283 is entitled "Taxes Under Prior Acts" and covers the jurisdiction of the Board as to deficiencies in taxes imposed by prior Acts. Subdivision (a) refers to deficiencies proposed after the effective date of the 1926 Act, not previously assessed. Subdivision (b) confirms in the Board any jurisdiction it might have obtained under appeals filed prior to the enactment of the 1926 Act; it does not purport to give the Board jurisdiction to redetermine the tax in any case not properly before it under the 1924 Act.

Let us now consider our appeal from the 1920 deficiency notice, in the light of these provisions. Be-

fore the 1926 Act became effective, the Investment Company had filed a petition with the Board, covering the year 1920, under the provisions of Section 274, Revenue Act of 1924, in response to a deficiency letter addressed to the *Investment Company* itself, by the Commissioner. Section 274 of the Revenue Act of 1924 was applicable solely to *taxpayers* and not to *transferees,* for there were no transferee provisions in that Act.

Section 283 (b) of the Revenue Act of 1927 affirmed and retained in the Board such jurisdiction as it has obtained under appeals filed theretofore under the Revenue Act of 1924. Accordingly, the Board very properly retained jurisdiction of the appeal filed by the respondent on the 1920 *deficiency* notice, and, under the facts, made the only determination which was possible for it to make: that there was no deficiency to the respondent for the taxable year 1920.

However, the petitioner now contends for the first time that even though the respondent owed no *deficiency* as a taxpayer for the year 1920, nevertheless the Board should have determined its liability, if any, as a *transferee* under the provisions of Section 280 of the Revenue Act of 1926. This provision was inserted in the 1926 Act by Congress to permit the Commissioner to assert against transferees and fiduciaries, liabilities for taxes or otherwise, which previously he could assert only *in court proceedings.*

As was said in Senate Report No. 52, 69th Cong. 1st Sess., January 16, 1926, at page 30:

> "Under existing law proceedings for the enforcement of liabilities such as those heretofore

> discussed are *solely by court proceedings.* No proceeding before the Board for the redetermination of a deficiency and for the ultimate enforcement by assessment and distraint may be had."

The transferee proceedings provided for in Section 280 were clearly intended to be only prospective in their operation. For example, subdivision (e) provided expressly:

> "This section shall not apply to any suit or other proceeding for the enforcement of the liability of a transferee or fiduciary *pending at the time of the enactment of this Act.*"

Obviously, Section 283(b) was not intended retroactively to give the Board jurisdiction under Section 280 which expressly did not become operative until February 26, 1926.

Likewise, Section 274(e) of the Revenue Act of 1926 merely authorized the Board to determine the taxes under the proceedings and issues properly presented to it, and cannot properly be construed as retroactively giving the Board jurisdiction over the respondent as a transferee under a petition appealing from a deficiency notice.

It should be borne in mind that this is not merely a formal or procedural question, but one pertaining to the jurisdiction of a statutory tribunal of strictly limited jurisdiction. Strict compliance with the statutory provisions is necessary to give jurisdiction to the Board and validity to its determinations. This is not a case of a purely formal defect which has been waived. For the year 1920, the Commissioner pro-

posed deficiencies against the Investment Company as a taxpayer. If the notices for this year had been addressed to the "Investment Company" as transferee, the Board would have been without jurisdiction to act; but upon the appeal from a deficiency notice, the Board obtained a limited jurisdiction and properly determined the only issue before it—that no deficiencies were due by the Investment Company as a taxpayer.

With respect to the year 1921, the situation is equally clear. The deficiency notice was not mailed and the petition was not filed until after the 1926 Act became effective. The petition was filed by the wrong party, so the Board obtained no jurisdiction at all. Accordingly, there is no merit in the Commissioner's contention that Section 274(e) is applicable. As a matter of fact, the Commissioner never claimed before the Board that the Investment Company should be held liable as a transferee under Docket No. 20,801. Accordingly, there can be no question of a *waiver* of the alleged "defect" of notice, as in *Tucker v. Alexander,* 275 U. S. 228. At the hearing before the Board, the respondent herein made no waivers and contended strongly for the conclusions which the Board, itself, finally made.

The respondent apparently contends that, having obtained jurisdiction over a party as a *taxpayer,* the Board should in the same proceeding assert its liability as a *transferee.* We respectfully submit that there is no statutory warrant for this contention. Section 280 of the Revenue Act of 1926, covers all the provisions in the law giving the Commissioner au-

thority to proceed against the transferee or fiduciary in the same manner as he would proceed against taxpayers. Throughout this section a very careful distinction is made by Congress between "transferees" and "fiduciaries" on the one hand, and "taxpayers" on the other. Such distinction appears in Subdivisions (a) (1) and (2); and (b) (1), (2) and (3); (c), (d) and (e). If the term "taxpayer" were interpreted in these sections as including transferees and fiduciaries, then obviously the intention of Congress would be thwarted and there would be hopeless confusion as to statutes of limitation and other rights of the parties. A casual reading of Section 280 will convince the Court of this fact.

The distinction between the statutory "taxpayer," primarily liable for the tax, and the "transferee," liable only secondarily or in equity, is clearly recognized in Section 602 Revenue Act of 1928, which amended the 1926 Act by adding Section 912, under the heading "Transferee Proceedings," as follows:

> "In proceedings before the Board the burden of proof shall be upon the Commissioner to show that a petitioner is liable as a *transferee* of property of a *taxpayer,* but not to show that the taxpayer was liable for the tax."

Furthermore, this distinction has been recognized clearly and consistently in the practice of the Treasury Department. Where the Commissioner is proceeding against the "taxpayer," the notice is on one form, referring only to Section 274; where he proceeds against a "transferee or fiduciary," the notice refers specifically to Section 280. In the instant case,

for example, the Commissioner issued a notice for the 1921 deficiency, on September 1, 1926, (Petitioner's Exhibit No. 11) to the Fruit Company as the "taxpayer," which is now before this Court. On December 29, 1927, he issued a notice to the Investment Company as transferee, (Petitioner's Exhibit No. 12) the first paragraph of which reads as follows:

> "As provided in Section 280 of the Revenue Act of 1926, there is proposed for assessment against you the amount of $21,867.40 constituting *your liability as transferee* of the assets of the San Joaquin Fruit Company, formerly of Tustin, California, for unpaid income tax in the above amount *due from the above-named taxpayer* for the year 1921 as shown by the attached statement plus any accrued penalty and interest."

Subdivision (d) of Section 280 provides expressly for the mailing of notices "to the transferee or fiduciary." In the present case the notice for the 1921 tax—the only notice mailed under the Revenue Act of 1926—was not addressed to the Investment Company but the Fruit Company. Obviously, no notice was given that the Commissioner was proceeding under the transferee or fiduciary provisions of Section 280. The notice for the 1920 tax was addressed to the Investment Company as a taxpayer at a time when there was no authority in the law for such notices to be sent to transferees, and it seems quite obvious that such notice could not in any way be taken as initiating transferee proceedings under the provisions of a revenue act not then in existence.

This is by no means a novel question, but on the contrary, the same situation has arisen in numerous

cases before the Board. In *Carnation Milk Products,* 20 B. T. A. 627, the deficiency notice was issued on July 6, 1926, to a dissolved corporation, and a petition was filed by another corporation which described itself as "the successor to, or transferee of the assets, of" the old company. The Board held that it did not thereby acquire jurisdiction to determine the petitioner's liability, if any, as a *transferee.* It is of the utmost significance that the Commissioner has announced his acquiescence in this decision. See X-3 Int. Rev. Bull. 4901, page 1.

To the same effect were the decisions of the Board in

Engineers Oil Co., 14 B. T. A. 1148 (Acq. VIII-2 C. B. 16);
Bond, Inc., 12 B. T. A. 339;
Weis & Lesh Mfg. Co., 13 B. T. A. 144;
Bisso Ferry Co., 8 B. T. A. 1104;
American Arch Co., 13 B. T. A. 552;
Consolidated Textile Corporation, 16 B. T. A. 178;
Gideon-Anderson Co., 18 B. T. A. 329;
Sanborn Brothers, successors, etc., 14 B. T. A. 1059 (Acq. VIII-1 C. B. 46).

In the cases of *Bond, Inc.* and *American Arch Co.,* the dismissal for lack of jurisdiction was *upon motion of the Commissioner.* In the *Consolidated Textile Corporation,* an appeal was dismissed by the Circuit Court of Appeals, 4th Circuit, on October 21, 1930, *upon motion of the Government.* Likewise, in the *Gideon-Anderson Co.,* an appeal was dismissed by the Circuit Court of Appeals, 8th Circuit, on October 17,

1930, *upon motion of the Government.* None of the other cases were appealed, so all the above-cited decisions represent authoritative precedents upon the exact question here presented, as an analysis of their facts will show.

To upset this line of decisions in the present case would result in inequality in the application of the law, and uncertainty and confusion as to the jurisdiction of the Board in numerous cases. Certainly a statutory tribunal of limited jurisdiction should not be permitted to acquire jurisdiction purely by waiver or unauthorized appearances by volunteers; and in all cases of doubt, the Board's own decision, that the facts do not justify its assumption of jurisdiction, should be approved by the Appellate Court.

Accordingly, the decision of the Board should be affirmed: as to the years 1918 and 1919, because no error is assigned or specified as to those years; and as to the years 1920 and 1921, because no questions rise upon the record, and in any event the decision was right.

Dated, San Francisco,
March 28, 1931.

Respectfully submitted,
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